

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELALTE SIDE

WRIT PETITION NO.1686 OF 2003

1. Union of India,
(Through its Secretary),
Human Resources Development
Department, Ministry of
Education, New Delhi.
2. Kendriya Vidyalaya Sangathan,
(Through its Commissioner),
18, Shaheed Jeet Singh Marg,
Institutional Area, New Delhi-110 016.
3. The assistant commissioner,
Kendriya Vidyalaya Sangathan,
Mumbai Region, IIT Powai,
Mumbai-400 076.
4. Kendriya Vidyalaya,
(Through its Principal),
Nagar Naka, Cantonment,
Aurangabad-431 002.

...Petitioners

Versus

1. Mr.Akhilesh Kumar Vidyarthi,
S/o.Satyanarayan Yadav, aged 32,
years, R/o. C/o.[R.V.Babrekar](#),
31, Suyog, Nandanwan Colony,
Aurangabad.
2. State of Maharashtra,
Through the Office of Government
Pleader, Appellate Side,
High Court, Mumbai.

...Respondents.

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Mr.Suresh Kumar for the Petitioners.
Mr. V.N. Tayde for Respondent No.1.
Mr. S.R. Nargolkar, AGP for Respondent No.2.

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CORAM : S. RADHAKRISHNAN, J. &
DR.D.Y.CHANDRACHUD, JJ.

November 24, 2004.

JUDGMENT : (PER DR.D. Y. CHANDRACHUD, J.):

I

The Central Administrative Tribunal set aside, on 18th February 2004, an order by which the services of the First Respondent were terminated during the period of probation. Consequential reliefs have been granted. The issue to which the Court has to address itself is as to whether the termination in this case, was a termination simplicitor or, as the Tribunal has held, the foundation of the termination was an act of misconduct. For the reasons which we now propose to set out, we have arrived at the conclusion that the order of the Tribunal is manifestly incorrect. The petition filed by the Union of India under Article 226 of the Constitution consequently has to be allowed.

II

2. The First Respondent was appointed as a Primary Teacher at Kendriya Vidyalaya, Aurangabad, on probation for a period of two years on 2nd September 1997. On 29th July 2000, the term of probation was extended till 15th September 2000. In September 1999, the First Respondent accompanied a batch of students on a sports mission and was entrusted with an amount of money for undertaking the expenses of the visit. On 7th December 1999, a memorandum was issued by the Principal which recited that by a Travelling Allowance bill dated 28th October 1999 submitted by the First Respondent, he claimed certain amounts towards “auto charges and D.A.” for students which had not actually been expended. It was alleged that the First Respondent had threatened the students thereafter, and obtained their statements in his favour and against the Principal. The Memorandum then recited that all these actions may lead to a major penalty. However, the First Respondent was given an opportunity to submit a revised T.A. Bill based on actual

expenditure and to apologise for his misconduct on or before 10th December 1999 failing which, the entire matter would be dealt with in a 'strict manner for appropriate action as per rules'. The First Respondent responded to the Memorandum and denied the allegations against him. On 5th January 2000 he was suspended pending disciplinary action. On 27th January 2000, an order was passed by the Principal for the recovery of an amount of Rs.1,261/- from the emoluments payable to the First Respondent for the month of January 2000. On 1st February 2000, the probationary services of the First Respondent came to be terminated.

3. The First Respondent thereupon moved an application before the Central Administrative Tribunal which has been allowed on 18th February 2002. The Tribunal holds that though “a look at the termination order clearly shows that it is a simple order of termination”, yet in the facts and circumstances of the case, the termination would have to be regarded as not a termination simplicitor, but as punitive in nature. The reasons which weighed

with the Tribunal in arriving at this conclusion are as follows :

“We find that the applicant was suspended during the extended probation period, some sort of enquiry was conducted. A recovery of Rs.1,261/- was ordered from the applicant on account of his submitting claims in a false manner. All these go to show that there was a foundation. The enquiry was also conducted behind the back of the applicant. It is also seen that his probation period was extended vide order issued in July 2000 when already the incident had taken place in September, 99.”

III

4. The correctness of the order of the Tribunal essentially turns on the question as to whether, the circumstances which weighed with the Tribunal in holding that this was a case of punitive termination, are susceptible to this conclusion. These

circumstances, to recapitulate are : (i) that the First Respondent was suspended during the extended period of probation; (ii) that some sort of enquiry was conducted behind the back of the First Respondent; (iii) that a recovery of Rs.1,261/-was ordered from the First Respondent on account of his having submitted a claim in a false manner; and (iv) the period of probation was extended in July 2000 and when incident took place in September 1999.

5. Counsel for the Petitioners assailed the view of the Tribunal as being in conflict with the law laid down by the Supreme Court. Counsel submits that this is not a case where the non-submission of an accurate T.A. Bill can be regarded as the foundation of the order of termination. The submission is that (i) there was in fact, no regular departmental enquiry; (ii) the Memorandum which was issued to the First Respondent was only with a view to enabling him to have an opportunity to rectify the accounts and explain his conduct; (iii) the memorandum contemplated that if the explanation was found unsatisfactory, a fullfledged enquiry would have to be held and (iv) it was always

open to the employer to proceed to effect a termination simplicitor instead of proceeding ahead with the convening of a fullfledged departmental enquiry.

6. On the other hand, on behalf of the First Respondent it was submitted that (i) the order which was issued on 27th January 2000 by the Principal, a little prior to the order of termination dated 1st February 2000 records that the matter relating to false/irregular claims made by the First Respondent on 20th October 1999 was enquired of from the students; (ii) it was discussed in the meetings of the Executive Committee and that it was found that the First Respondent had claimed an amount of Rs.1,261/- in excess of what was admissible. This, it was submitted, showed that the foundation of the order of termination was the act of misconduct on the part of the First Respondent.

IV

7. The First Respondent was a probationary teacher. Clause 6 of the letter of appointment specifically provided that

during the period of probation and thereafter until confirmation, the services of the First Respondent were terminable on one month's notice on either side, without any reason being assigned. The order of termination is on its face, an order of termination simplicitor. All that the order records is that the services of the First Respondent are being terminated forthwith and that the First Respondent would be entitled to one month's pay and allowances in lieu of notice.

8. The correctness of the order of the Tribunal is sought to be supported on behalf of the First Respondent almost exclusively on the basis of the order that was passed by the Principal on 27th September 2000. In order to appreciate the submission, a brief reference to the background is necessary. During the course of the period of probation, the First Respondent had accompanied a batch of students on a sports trip to Panvel and submitted on return, a T.A. Bill. On 7th December 1999, a memorandum was submitted to him by the Principal, inter alia making certain allegations in regard to the incorrectness of the amount which had

been claimed and in regard to the behaviour of the First Respondent. The memorandum, however, furnished an opportunity to the First Respondent to submit a revised T.A. Bill based on actual expenditure and to explain his conduct, failing which it was stated that “the entire matter shall be dealt in a strict manner for appropriate action against him as per rules”. What is, therefore, abundantly clear is that a formal disciplinary enquiry was not launched with the issuance of the memorandum dated 7th December 1999. The memorandum must be regarded as only a preliminary opportunity to the First Respondent to submit a revised bill and to explain his conduct. Indeed, it is on that basis that the memorandum proceeds to state that if the First Respondent fails to do so, then in that event, the entire matter would be dealt with in accordance with the rules. Neither was any disciplinary enquiry initiated, nor was any charge framed. No Enquiry Officer was appointed and hence, there was no occasion for an enquiry report establishing any finding of guilt against the First Respondent. On 27th January 2000, the Principal, however, addressed a memorandum directing the recovery of an amount of Rs.1,261/-

from the First Respondent. The services of the First Respondent were terminated on 1st February 2000.

V

9. The question is whether the termination of the services of the probationer is in these facts a termination simplicitor. The law on when a termination can be said to be founded upon an antecedent act of misconduct has been the subject matter of judicial pronouncement dating back to 1957, if not earlier. In **Parshotam Lal Dhingra v. Union of India**, AIR 1958 SC 36, a Constitution Bench of the Supreme Court held that if termination is founded on a right flowing from a contract or service rules, prima facie it does not operate as a punishment and does not carry with it, evil consequences so as to attract Article 311 of the Constitution. However, even if Government has power to terminate the contract of employment under the terms of the contract or under the rules without adopting the procedure for inflicting the punishment of dismissal, Government may nevertheless choose to punish its employee and if the termination is sought to be founded

on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be observed. The real test, the Supreme Court has observed, for determining whether the reduction is or is not by way of punishment is to find out if the order for reduction also visits the servant with any penal consequences and the use of the expression 'terminate' or 'discharge' may not by itself be conclusive.

10. In subsequent decisions, Courts have had to draw a distinction between whether an allegation of misconduct was only a motive for dispensing with service or whether it is the foundation for termination. Though the principles have been elucidated in successive cases, the application of those principles in individual facts is, as decided cases would show, not entirely free from difficulty in certain cases. **Champaklal Chimanlal Shah v. Union of India**, AIR 1964 SC 1854 was a case where notice was issued to the employee to explain certain irregularities and to explain why disciplinary action should not be taken. A preliminary enquiry was

held after which instead of pursuing regular departmental proceedings, the services of the employee came to be terminated. The Constitution Bench of the Supreme Court held that the order of termination was not by way of a punishment and the object of the preliminary enquiry was to collect facts in regard to the conduct and work of a Government servant. It was only when a regular departmental enquiry was held that the employee was entitled to the benefit of the procedure prescribed by Article 311 of the Constitution. **A. G. Benjamin v. Union of India**, (1967) 1 LLJ 718 was a similar case where a notice was issued to the employee to show cause as to why disciplinary action should not be pursued on allegations which formed the subject matter of the framing of charges and the appointment of an Enquiry Officer. The Supreme Court held that though the departmental enquiry was thereafter abandoned, it was still open to the authorities to make an order of termination simplicitor in terms of the contract of service or the relevant statutory rules. The termination was held to be a mere discharge effected under the terms of the contract or the rules and was not to be regarded as a dismissal because the employer was

actuated by the motive that the Government servant did not deserve to be continued in service for some alleged inefficiency or misconduct.

11. In **State of Uttar Pradesh vs. Kaushal Kishore Shukla**, (1991) 1 SCC 691, the employee while conducting an audit was alleged to have acted in excess of authority and to have irregularly demanded an exorbitant amount as audit fee of which a part was collected. A preliminary enquiry was held in which it was found that the employee had acted beyond the scope of authority in demanding and collecting the audit fee. The services of the employee came to be discontinued. The Supreme Court held thus :

“The competent authority held a preliminary inquiry in the allegations of improper conduct in carrying out unauthorised audit of Boys Fund of an educational institution, on result of the preliminary enquiry no charges were framed against the respondent, no officer

was appointed for holding the departmental enquiry instead the competent authority chose to terminate the respondent's services in exercise of its power under the terms of contract as well as under the relevant rules applicable to a temporary government servant. It never intended to dismiss the respondent from service. Holding of preliminary inquiry does not affect the nature of the termination order."

12. The issue was reagitated before the Supreme Court in **Radhey Shyam Gupta vs. U.P. State Agro Industries Corporation Ltd.**, (1999) 2 SCC 21. The principles which can be culled out from the judgment of Mr. Justice M. Jagannadha Rao may be summarised as follows :

-(i) The termination of the services of a temporary servant or probationary employee on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory will not be punitive inasmuch as these facts constitute merely the motive and

not the foundation. The reason for this is that the assessment is carried out not with the object of determining whether the employee is guilty of misconduct, but in order to decide whether he is to be retained or continued in service;

-(ii) Even if a preliminary enquiry is conducted by the employer that does not alter the situation because the purpose of that enquiry is only to determine as to whether there is prima facie evidence or material to initiate a regular departmental enquiry. If a termination follows a preliminary enquiry, it will not be vitiated even if the employee has not been heard in the course of preliminary enquiry;

-(iii) Even if a regular departmental enquiry is initiated in the course of which a chargesheet is issued, an explanation of the employee is obtained and an Enquiry Officer is appointed and the enquiry is thereafter dropped following which a simple notice of termination is issued, that will not be regarded as punitive because the Enquiry Officer has not recorded any evidence or given any

findings on the charges;

-(iv) There may, however, be cases where the termination is preceded by an enquiry in which evidence is received and findings of misconduct of a definitive nature are arrived at behind the back of the employee. Where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice since the purpose of the enquiry is to determine the truth of the allegations with a view to punish the employee and not merely to gather evidence for a regular departmental enquiry to be held in future. The foundation of the termination is misconduct and is, therefore, punitive.

13. Radhey Shyam (supra) is a case which provides an illustration of a situation where the order of termination was held to be punitive in nature. This is evident from the following extract which illustrates as to what had taken place in the circumstances of that case:

“Coming now to the facts of the case before us, the enquiry officer, Shri R.P. Singh examined witnesses and in his report dated 22-1-1976 has said: “I conclude that Shri [R.S.Gupta](#) took a sum of Rs.2000 from Shri Jai Chandra Lal”, and thereafter referring to certain facts said “they go to prove the correctness of the complaint”. Not only that, he concluded: “I therefore, suggest that the services of Shri [R.S.Gupta](#) may be terminated and one month's salary may be given to him in lieu of the notice.” The very next day, the impugned simple order of termination follows.”

On these facts, the Supreme Court held that the Enquiry Officer had examined witnesses, recorded statements and had furnished a clear finding that the employee had accepted a bribe. The Enquiry Officer had even recommended the termination of the employee following which an order of termination was passed on the very next day. The report of the Enquiry Officer was not a preliminary enquiry report. Hence, it was held that the report constituted the

foundation and not merely the motive for the order of termination and was vitiated.

14. In a more recent decision, **Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences**, (2002) 1 SCC 520, Mrs. Justice Ruma Pal speaking for a Bench of two Learned Judges of the Supreme Court, formulated the principles that emerge from the decided cases. The Learned Judge held thus:

“One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present, the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld.”

The Supreme Court held that when a probationer's appointment is terminated, it means that the probationer is unfit for a job. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job. On facts, the Supreme Court held thus:

“We are also not prepared to hold that the enquiry held prior to the order of termination turned this otherwise innocuous order into one of punishment. An employer is entitled to satisfy itself as to the competence of a probationer to be confirmed in service and for this purpose satisfy itself fairly as to the truth of any allegation that may have been made about the employee. A charge sheet merely details the allegations so that the employee may deal with them effectively.

The enquiry report in this case found nothing more against the appellant than an inability to meet the requirements for the post. None of the three factors catalogued above for holding that the termination was in substance punitive exists here.”

VI

15. The principles which have been enunciated by the Supreme Court in these decided cases lead us to the conclusion that the order of termination in the present case must be held and regarded as a termination simplicitor. The First Respondent was a probationer, initially for a period of two years from 2nd September 1997. On 29th July 2000, the term of probation was extended for a further period of one year upto 15th September 2000. The order of termination does no more than dispensing with the services of the probationer without attributing any stigma or evil consequences. A memorandum had been issued to the probationer on 7th December 1999 in regard to a [T.A.Bill](#) which was submitted by him pursuant to a school trip and the memorandum also called upon the First

Respondent to explain his conduct in relation to certain events that had taken place. The memorandum, however, specifically provided that it was issued with a view to furnish the First Respondent an opportunity to submit a revised T. A. Bill and to apologise for his behaviour, failing which the matter would be dealt with in a "strict manner for appropriate action against him as per rules". The First Respondent submitted his explanation following which on 27th January 2000, the Principal directed that a recovery of Rs.1,261/- be made from the First Respondent of the amount which had been claimed by the First Respondent in excess of what was duly admissible. The facts of the case demonstrate that there was no full-scale or formal enquiry into allegations involving moral turpitude or misconduct which culminated in a finding of guilt. None of the three factors which by the judgment of the Supreme Court in **Pavanendra Narayan'** case must cumulatively be shown to have existed, are shown to exist in the facts of the present case. No regular departmental enquiry was convened. No chargesheet was issued. Hence, there was no question of there being any finding of misconduct. The termination of the services of the First

Respondent was a termination simplicitor and was not based on the report of a regular departmental enquiry since there was in fact, no such enquiry. The mere fact that the First Respondent was under suspension cannot alter the situation. The suspension was in contemplation of departmental proceedings which never took place.

16. In these circumstances, we are of the view, that the Tribunal was in manifest error in holding that “there was a foundation”. None of the circumstances which has been adverted to in the order of the Tribunal is sufficient to sustain the plea that the termination in the present case was not a termination simplicitor, but a termination based on a foundation of antecedent misconduct. We are, therefore, unable to sustain the view of the Tribunal.

17. The petition is allowed. The order of the Central Administrative Tribunal dated 18th February 2002 is quashed and set aside. Original Application No.535 of 2000 filed by the First

Respondent before the Central Administrative Tribunal, Mumbai,
shall stand dismissed. There shall be no order as to costs.

(S.RADHAKRISHNAN, J.)

(DR. D.Y. CHANDRACHUD, J.)